Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 81.

HARRY B. SMITH, AUDITOR OF MARION COUNTY, INDIANA, PLAINTIFF IN ERROR,

v.

THE STATE OF INDIANA ON THE RELATIONS OF MARTHA LEWIS AND BENJAMIN LEWIS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

Two points have been raised in the brief of the defendant in error which were not referred to in our brief because not anticipated, and because their briefs were not received in time to do so. The points are:

1st. That plaintiff in error does not present any question for the determination of the court, because he is not a person in interest.

2d. That a ministerial officer cannot defend in a mandamus proceeding on the ground of the unconstitutionality of the law.

We will discuss them in their order.

I.

Has the plaintiff in error such an interest in the cause of action that he either may or must prosecute the action? He certainly has such an interest that he not only may but must prosecute the action. He is a public officer—the county auditor—striving to protect and conserve the public interest and collect the public revenues. The Attorney General is in the anomalous position of seeking to deprive the public of part of its revenue by enforcing deductions.

With the doctrine that a court will not "listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it" (Cooley's Const. Lim., 6th ed., p. 196), we have no quarrel; neither do we quarrel with the doctrine of the several cases, Clark *v.* Kansas City, 176 U. S., 114; Red River Valley Bank *v.* Craig, 181 U. S., 548; Giles *v.* Little, 134 U. S., 645. They only hold that a person without interest cannot prosecute a cause. This is true. But the cases do not fit this cause. The auditor or any other public officer whom it is sought to mandate to perform any alleged public duty has such an interest in the litigation that he not only

may but he must prosecute an action to a finality. It is his duty so to do. Hence the cases cited are not authorities in the case at bar.

In this sort of an action the granting of the deduction is the equivalent of giving of a credit for so much tax or the drawing of a warrant.

In any view of the case, whether the officer has a personal interest in the question, or if the nature of the office is such as to require him to raise it, he may make defense and it is his duty to do so.

Denman *v.* Broderick, 111 Cal., 97.
Norman *v.* State Board, 93 Ky., 537.
Von Schmidt *v.* Wilbur, 105 Cal., 151.
Smith *v.* Broderick, 107 Cal., 644.

IV.

Can a ministerial officer defend a mandamus case on the ground of the unconstitutionality of a law?

Upon this question the cases are in irreconcilable conflict.

19 Enc. Law., p. 764.

It is always a question of the particular case. In their brief the State cite People *ex rel. v.* Salomon, 54 Ill., 39. This is not a mandamus case at all, but a case involving a contempt proceeding. But, admitting it so holds, yet in—

People *v.* Soloman, 46 Ill., 333;
People *v.* Miner, 46 Ill., 384;
Madison Co. *v.* People, 58 Ill., 456;
People *v.* Thompson, 155 Ill., 451,

exactly the opposite doctrine was held, and all were mandamus cases in which it was sought to mandate an officer to perform some prescribed duty and wherein he answered that the statute was unconstitutional.

If the State of Florida held as shown in Commissioners of Franklin Co. *v.* State *ex rel.*, 24 Fla., 55 (Def't's Brief, p. 12), it also held the contrary doctrine in McConihe *v.* State, 17 Fla., 238, and State *v.* Hooker, 36 Fla., 358.

The State cites (Brief, pp. 11 to 17) twelve cases from eight States, but of these eight States five have also decided the same question the other way; these are Louisiana, Illinois, Nebraska, West Virginia, and Florida. The Illinois and Florida cases are cited above. The others are:

State *v.* New Orleans, 42 La. Ann., 92.
State *v.* Judge, 5 La. Ann., 756.
State *v.* Moore, 40 Neb., 854.
State *v.* Wyoming Co., 47 W. Va., 672.

But arrayed against this doctrine are some sixteen State and the Federal court in following cases:

Hoover *v.* McChesney, 81 Fed., 483.
Huntington *v.* Worthen, 120 U. S., 97 (101–102).
State *v.* Stout, 61 Ind., 143.
Denman *v.* Broderick, 111 Cal., 97.
Brandenberg *v.* Hoke, 101 Cal., 101.
Smith *v.* Judge, 17 Cal., 547.
Patly *v.* Colgan, 97 Cal., 251.
Maynard *v.* Board, 84 Mich., 226.
Public Schools *v.* Allegheny Co., 20 Md., 449.

State *v.* Baltimore Co., 29 Md., 516.
Police Coroners *v.* Louisville, 3 Bush (Ky.), 597.
Auditor *v.* Haycraft, 14 Bush (Ky.), 384.
State *v.* Medaris, 1. Kan., 90.
Savannah *v.* State, 4 Ga., 26.
State *v.* Mason, 153 Mo., 23.
State *v.* McKenney, 5 Nev., 194.
Humboldt Co. *v.* Churchill, 6 Nev., 30.
Peli *v.* Newark, 40 N. J. L., 71.
Laxewood Tp. *v.* Brick Tp., 55 N. J. L., 275.
Peafle *v.* State Board, &c., 129 N. Y., 360.
McDermott *v.* Dennie, 6 N. Dak., 278.
State *v.* Mitchell, 31 Oh. St., 592.
State *v.* Whitworth, 8 Lea (Tenn.), 594.
Williams *v.* Taylor, 83 Tex., 670.
State *v.* Saux Co., 62 Wis., 376.

The true doctrine is that every case stands upon its own facts. Here the auditor, a public officer, is in the attitude of defending the public revenue against dissipation and unlawful credit under an unconstitutional law. This is a case where the auditor not only may but must defend, and upon this very ground.

The State, we submit, is in error in stating (Brief, pp. 18–19) that the court in the first appeal "held the law constitutional and valid in every particular." The judgment in that case was not a final judgment—not one which could be taken by writ of error to the United States court. The judgment in the original case was "judgment reversed with instructions to the court below to overrule the demurrer to

the application and alternative writ, and for further proceedings not inconsistent with this opinion" (Record, p. 20). This was not a final judgment, and the two appeals, though twice docketed, are in reality but one cause.

Respectfully submitted.

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